

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT

MUR: 6988

DATE COMPLAINT FILED: November 30, 2015

DATE OF NOTIFICATION: December 4, 2015

LAST RESPONSE RECEIVED: January 21, 2016

DATE ACTIVATED: February 26, 2016

EXPIRATION OF SOL: September 28, 2019
(earliest)

January 15, 2020 (latest)

ELECTION CYCLE: 2016

COMPLAINANT:

Brad Woodhouse, American Democracy Legal
Fund

RESPONDENTS:

Conservative Solutions Project, Inc.
Robert Watkins, Treasurer
Pat Shortridge, President/Director
J. Warren Tompkins, Director
Joel McElhannon, Director

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30104(c)
11 C.F.R. § 100.22

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

Internal Revenue Service website

I. INTRODUCTION

The Complaint alleges that Conservative Solutions Project ("CSP") disseminated two television advertisements in support of then-Presidential candidate Senator Marco Rubio but failed to report the related costs as independent expenditures to the Commission. CSP argues that the two advertisements do not contain express advocacy and, therefore, did not need to be reported. As discussed below, the Office of General Counsel recommends that the Commission

1 find no reason to believe that CSP failed to report two advertisements as independent
2 expenditures. We further recommend that the Commission close the file.

3 **II. FACTS**

4 CSP has been incorporated in Delaware since January 29, 2014, and organized under
5 section 501(c)(4) of the Internal Revenue Code.¹ Respondents Robert Watkins, Pat Shortridge,
6 J. Warren Tompkins, and Joel McElhannon hold executive and/or director positions with CSP.²
7 CSP states on its website that its purpose is, "Working with bold, persuasive leaders to bring
8 Conservative Solutions to the problems that currently plague our nation. By engaging citizens so
9 America beats Washington, we can transform the tax code, restore our military and America's
10 standing in the world, and shrink and restructure the federal government."³

11 The Complaint alleges that CSP disseminated two television advertisements that
12 expressly advocated Marco Rubio's election for President.⁴ The ads ran in September and
13 October 2015 in the early primary states of Iowa, New Hampshire, and South Carolina.⁵ The
14 Complaint cites a news article reporting that CSP spent approximately \$680,000 in Iowa,
15 \$835,000 in New Hampshire, and almost \$600,000 in South Carolina to broadcast the television

¹ Resp. at 1-2; Del. Div. of Corps. Filing.

² The Complaint notes that CSP's board is closely linked to Rubio through respondents Shortridge, a former Rubio advisor, and Tompkins, a former business partner of Rubio's campaign manager. Compl. at 2-3.

³ Resp. at 2; www.conservativesolutionsproject.com (last visited June 24, 2016). The Complaint describes the CSP website as prominently featuring Rubio's picture and including a video of him on the homepage. Compl. at 2; *see, e.g.*, Attach. 1 (CSP website homepage screenshot on Jan. 25, 2016). More recently, since Rubio dropped out of the presidential race on March 15, 2016, the website has not featured Rubio in that way.

⁴ Compl. at 5. The Complaint also asserts that CSP sent "Rubio-boosting" mailers to voters in early primary states, but it did not attach copies of any such mailers (nor could we locate them) or make any specific allegations in connection with the mailers. *See id.* at 3. Thus, this Report does not address the mailers any further.

⁵ *Id.* at 2-4.

advertisements.⁶ The Complaint concludes that CSP violated the Act because it did not file independent expenditure reports for the disbursements.⁷

The two advertisements the Complaint identifies contain the following content:⁸

"Greatness"

Audio	Visual	Time
[Rubio] <i>Our greatness was not an accident.</i>	Flag blowing	0-2
<i>It didn't happen on its own.</i>	Rubio speaking (CPAC speech); Rubio's name on screen	3-6
<i>Our greatness is the result of God's blessings</i> ...	Rubio speaking	
<i>The sacrifices made by men and women in uniform ...</i>	Iwo Jima	7-10
<i>And the choices made by the people here before us.</i>	NASA space rocket showing USA	11-14
<i>God is still blessing America.</i>	Fields of grain	15-17
<i>If ever there has been an era in human history tailor-made for us as a people, it is the 21st century.</i>	Rubio and an aerial shot of large homes in a suburb	21-25
<i>What is standing in the way are outdated leaders that refuse to let go of the past.</i>	Rubio speaking	
[Narrator] <i>Learn more at conservative solutions project dot com.</i>	Rubio image in front of flag; disclaimer on screen	26-30

⁶ *Id.* at 3.

⁷ The Complaint further cites to several articles that describe how CSP has purportedly exploited its 501(c)(4) tax status to avoid disclosing its donors notwithstanding its electoral focus on Rubio. *See id.* at 2-3, notes 3,5,7. Because the Commission lacks jurisdiction over the propriety of CSP's tax status, we do not discuss this issue any further in this Report. *See, e.g.,* First GCR at 4, n.4, MUR 5972 (Iowa Christian Alliance).

⁸ A video of each ad is available in the Voting Ballot Matters folder.

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"American Dream"

Audio	Visual	Time
<i>[Rubio] What we are called upon to do now is to ensure ...</i>	Rubio speaking	0-2
<i>... that the American Dream doesn't just survive ...</i>	Homes and porches with flags	3-4
<i>... but that it reaches more people and changes more lives than ever before.</i>	Rubio speaking	5-7
<i>[Narrator] New ideas for a new age.</i>	Woman with laptop; text on screen as narrator speaks	8-10
<i>Throw out the tax code.</i>	Federal tax form with "Refund" circled; text on screen as narrator speaks	11-12
<i>Overhaul higher education.</i>	College students; text on screen as narrator speaks	13-14
<i>Repeal and replace Obamacare.</i>	The White House; text on screen as narrator speaks	15-16
<i>[Rubio] You and I were left by our parents and grandparents the greatest nation in the history of the world. It is our obligation to keep it that way.</i>	Rubio speaking and his name on the screen	17-24
<i>[Narrator] Learn more at conservative solutions project dot com</i>	Still photo of Rubio and flag in background with disclaimer	25-30

Respondents argue that these advertisements do not contain express advocacy but rather are attempts to persuade individuals to support CSP's policy agenda by featuring popular leaders who share its views.⁹ CSP contends that its website includes policy prescriptions on issues of

⁹ Resp. at 2.

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1 importance to it and features other leaders and candidates in addition to Rubio.¹⁰ Respondents
2 conclude that the two ads did not need to be reported as independent expenditures.

3 III. LEGAL ANALYSIS

4 "Independent expenditures" are expenditures made by a person for a communication that
5 "expressly advocates" the election or defeat of a clearly identified candidate that is not made in
6 cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a
7 candidate's authorized committee or their agents, or a political party committee or its agents.¹¹
8 Independent expenditures must be reported to the Commission in accordance with 52 U.S.C.
9 § 30104.

10 A communication "expressly advocates" the election or defeat of a clearly identified
11 candidate under 11 C.F.R. § 100.22(a) when it uses phrases such as those specifically
12 enumerated in the text of the regulation (e.g., "vote for the President," "re-elect your
13 Congressman," "support the Democratic nominee") or contains campaign slogans or individual
14 words that "in context can have no other reasonable meaning than to urge the election or defeat
15 of one or more clearly identified candidate(s) such as posters or bumper stickers which say
16 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush,' or 'Mondale!'"¹² We conclude that neither of
17 the two advertisements at issue here appears to contain express advocacy under 100.22(a).
18 Although Rubio is "clearly identified" because both ads prominently feature Rubio, and the ads
19 present him alongside symbols of patriotism, democracy, and innovation, neither ad contains
20 phrases such as those specifically enumerated in the text of the regulation or any slogans or

¹⁰ *Id.*

¹¹ 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16.

¹² 11 C.F.R. § 100.22(a); *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976); *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 249 (1986).

1 words that urge his election as required by 11 C.F.R. § 100.22(a), and, thus, we conclude that
2 there is no express advocacy under that part of the regulation.

3 A communication contains express advocacy under 100.22(b) if, when taken as a whole
4 and with limited reference to external events, it “could only be interpreted by a reasonable person
5 as containing advocacy of the election or defeat of one or more clearly identified candidate(s),”
6 because it contains an “electoral portion” that is “unmistakable, unambiguous, and suggestive of
7 only one meaning” and “reasonable minds could not differ as to whether it encourages actions to
8 elect or defeat one or more clearly identified candidate(s) or encourages some other kind of
9 action.”¹³

10 We conclude that neither ad “could only be interpreted by a reasonable person” as
11 containing the advocacy of the election of a clearly identified candidate under 11 C.F.R.
12 § 100.22(b),¹⁴ notwithstanding the facts that “Greatness” and “American Dream” feature Senator
13 Rubio, who is the primary speaker in both ads and was a candidate for the Republican
14 nomination at the time of the broadcasts, and both were targeted for states with upcoming
15 primary elections.¹⁵

16 The "Greatness" advertisement appears to have the look and feel of a campaign speech,
17 both in tone and content, with Rubio orating about the greatness of America and the future

¹³ 11 C.F.R. § 100.22(b); *see also* Explanation and Justification, 60 Fed. Reg. 35,292, 35,295 (July 6, 1995) (“[C]ommunications discussing or commenting on a candidate’s character, qualifications or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question.”).

¹⁴ The September and October 2015 ad dissemination dates are well clear of the Commission's electioneering communications reporting periods. See 11 C.F.R. § 100.29(a)(2) (an "electioneering communication" is, *inter alia*, disseminated within 30 days before a primary or preference election or a convention or caucus). The relevant dates in Iowa, New Hampshire, and South Carolina were February 1, 9, and 21, 2016, respectively.

¹⁵ Both ads direct the viewer to CSP's website to "learn more." We have limited information, however, regarding CSP's website at the time the ads were disseminated. *See supra* note 3. *See also* Factual & Legal Analysis at 6, MUR 5788 (Republican Federal Committee of Pennsylvania) (mailer would not transform into an express advocacy communication by directing readers to a website that allegedly contains express advocacy).

1 leadership needs of the country. This perception is bolstered by the fact that the ads aired in
2 September and October 2015 in the early primary states of Iowa, New Hampshire, and South
3 Carolina at the same time Rubio was vying for the Republican nomination.¹⁶ Further, near its
4 conclusion, "Greatness" specifically criticizes "outdated leaders," and could be interpreted to
5 imply that Rubio, as the narrator, is not an outdated leader and thus, as Complainant suggests,
6 "better equipped to lead the country." However, "Greatness" does not reference Rubio's
7 candidacy, the presidential election, or any other election, nor does it urge the viewer to vote in
8 any manner. Further, the "outdated leaders" comment could be interpreted to refer to Rubio's
9 then-presidential opponents, but it also could be interpreted to refer to House or Senate
10 legislators or President Obama. Moreover, the primary focus of the communication is on issues
11 and policies, rather than on Rubio's "character, fitness and qualifications."¹⁷ This focus on
12 policies and issues, combined with the absence of any references to any election or candidacy,
13 leads to a conclusion that the ad does not contain an "electoral portion," let alone an
14 "unmistakable, unambiguous one."¹⁸ Therefore, we conclude that CSP was not required to
15 report "Greatness" as an independent expenditure because it does not expressly advocate Rubio's
16 election.

17 The "American Dream" advertisement similarly has the look and feel of a campaign
18 speech, featuring Rubio orating about the "American Dream" and touting the "new ideas for a
19 new age" that are required to allow the American Dream to reach more people. As with the first
20 ad, this perception is bolstered by the fact that the early primary states were targeted for the

¹⁶ See *supra* note 14.

¹⁷ See E&J, 60 Fed. Reg. at 35295.

¹⁸ See Advisory Op. 2012-11 (Free Speech) at 5-6 (no express advocacy under 100.22 if no electoral references).

1 airing of the ad. The focus on Rubio and his ideas could be understood to mean that the way to
2 achieve the new ideas is to elect Rubio. For instance, the image of the White House with the text
3 "repeal and replace Obamacare," could be interpreted as a call to replace President Obama in the
4 White House with Rubio. Nevertheless, as with the first advertisement, "American Dream"
5 lacks the electoral content necessary to constitute express advocacy under 100.22(b). Though
6 the advertisement discusses issues and policies, including proposals that are relevant to the
7 presidential election — throwing out the tax code, overhauling higher education, and repealing
8 and replacing Obamacare — it contains no references to Rubio's candidacy, the presidential
9 election, or any other election, it does not urge the viewer to vote in any manner, and it contains
10 no discussion of Rubio's "character, fitness and qualifications." Thus, the lack of electoral
11 content leads us to conclude that "American Dream" also contains no express advocacy.¹⁹
12 Therefore, we conclude that CSP was not required to report "American Dream" as an
13 independent expenditure because it does not expressly advocate Rubio's election.²⁰

14 IV. RECOMMENDATIONS

- 15 1. Find no reason to believe that Conservative Solutions Project, Inc.,
16 Robert Watkins, Treasurer, Pat Shortridge, President/Director, J. Warren
17 Tompkins, Director, and Joel McElhannon, Director violated 52 U.S.C.
18 § 30104(c);
19
- 20 2. Approve the attached Factual and Legal Analysis;
21
- 22 3. Approve the appropriate letters; and

¹⁹ Cf. MUR 5831 (Softer Voices) (ad criticizing Bob Casey's experience and praising Rick Santorum's leadership constituted express advocacy under 100.22(a) and (b)).

²⁰ See, e.g., First GCR at 8-9, Statement of Reasons of Comm'rs. Bauerly, Hunter, McGahn, Petersen & Walther at 4-5, MUR 6044 (Musgrove for Senate) (no express advocacy under 100.22(b) in television advertisement featuring candidate; reasonable minds could differ as to ad's meaning).

4. Close the file.

6-24-16
Date

Kathleen M. Guith
Kathleen M. Guith
Acting Associate General Counsel for
Enforcement

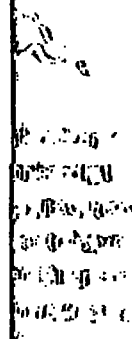
Peter Blumberg
Peter Blumberg
Assistant General Counsel

Elena Paoli
Elena Paoli
Attorney

Attachment

1. Conservative Solutions Project website screenshot (Jan. 25, 2016).

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Sign up today to keep the American Dream alive.

First Name _____ Last Name _____